(10)

No. 99-859

SEP 6 - 2000

IN THE

Supreme Court of the United States

Central Green Co.,

Petitioner,

v.

United States of America,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY OF THE PETITIONER

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QUESTION PRESENTED

Whether the Ninth Circuit erred in concluding that the Flood Control Act of 1928 immunizes Respondent from this suit?

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REPLY OF THE PETITIONER

The judgment below should be reversed because it conflicts with *United States* v. *James*, in which this Court held that "flood waters" for purposes of Section 702c are those "contained in or carried through a federal flood control project for purposes of or related to flood control." 478 U.S. 597, 605 (1986). This case involves irrigation waters leaking from the Madera Canal, which "is *not* a flood control project and serves *no* flood control purpose." Pet. App. 9a (court of appeals' opinion) (emphases added). Rather than seriously defending the Ninth Circuit's rationale, which the panel below acknowledged conflicts with *James*, Respondent asserts for the first time in this Court that it is entitled to immunity because a "substantial quantity" of the water that the Canal carries serves some flood control purpose. Resp. Br. 49-50. Not only is that factual claim hotly contested and impossible to resolve at this stage of the proceedings, but even assuming it were true Respondent plainly would *not* be entitled to immunity for the damage caused by the remainder of the water, which is approximately fifty percent or more of the Madera Canal's volume according to Respondent's own calculations. *Id.* at 40 & n.23. To the extent that other water releases into the Madera Canal serve multiple purposes, several sources confirm that Section 702c applies only to water carried for the "primary purpose" of flood control. Furthermore, this Court squarely held that the Friant Dam is not a "flood control project" in *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950), a determination that also applies fully to the Madera Canal, which Congress has in fact expressly deemed an "irrigation facility." For the same reasons, Respondent is not entitled to immunity on the theory that Petitioner was damaged by flood waters that a flood control project "could not control."

I. Petitioner Does Not Assert Damages Arising From "Flood Waters."

a. The Judgment Cannot Be Affirmed Given the Procedural Posture of this Case, Which Was Dismissed on the Pleadings. The procedural posture of this case is vital to this Court's decision, notwithstanding that Respondent relegates it to only two paragraphs of its brief. Resp. Br. 11-12. As Respondent acknowledges, Petitioner's position is that Section 702c does "not apply because the waters carried through the Madera Canal are used for irrigation pur-

poses and not for flood control." Resp. Br. 12. That claim is reflected in the complaint's allegations that Respondent is liable for damage caused by "irrigation water" escaping from the Madera Canal. J.A. 7, ¶ 2; *id.* 8, ¶ 7. Before any factual development, however, the district court dismissed Petitioner's complaint on the pleadings. Respondent now acknowledges, albeit only in footnotes, that "for purposes of the motion for judgment on the pleadings the allegations of the complaint must be accepted as true," that the complaint must be "liberally construed in petitioner's favor," and that "the government is entitled to judgment on the pleadings when 'it appears *beyond doubt* that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief.'" Resp. Br. 12 n.7, 32 n.17 (quoting *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957) (emphases added)). In fact, Respondent specifically admitted in the district court that it must be accepted as true that Petitioner was damaged by "irrigation waters." Resp. Mo. J. on Pleadings 2, *reprinted in* Ct. App. Ex. Rec. 139. See generally Pet. Br. 23-24.

The lower courts nonetheless held that Respondent was entitled to judgment on the pleadings based on Ninth Circuit precedent holding that all water carried for any purpose in any portion of a large multiple purpose water project such as the CVP is "flood water" for purposes of Section 702c. Pet. App. 5a-7a, 20a.[1] In this Court, Respondent does not seriously argue that the Ninth Circuit's reading of Section 702c is correct.[2] Instead, its brief is almost entirely devoted to the factual claim that the waters in this case have some relationship to "flood control" activities, as opposed to the Ninth Circuit's per se rule that Section 702 encompasses any water carried for any purpose in any portion of any project that is nominally authorized to engage in flood control.

[1] Respondent claimed in both its brief in opposition and again in a supplemental brief that the Ninth Circuit's holding rested on a determination that the water in the Madera Canal actually served a flood control function. BIO 6-11; Resp. Supp. Br. 7. But Respondent does not repeat that erroneous characterization of the Ninth Circuit's holding and it no longer disputes that the decision below rested *entirely* on the fact that the waters in question were carried in a component of the CVP. Resp. Br. 12 (court of appeals held § 702c applied "because the Madera Canal is part of a federal flood control project"), 18 (court of appeals held § 702c applies "because the Madera Canal is part of the Central Valley Project * * * and thus all waters in the Project are contained in or carried through it for purposes that are at least related to flood control").

[2] That is not surprising, given that, as Petitioner's opening brief explains, the Ninth Circuit's reading of Section 702c is insupportable. *James* squarely held that Section 702c applies only to waters carried "for purposes of or related to flood control," 478 U.S. at 605, a requirement that, as the panel below expressly acknowledged, the Ninth Circuit's standard "delete[s]," Pet App. 7a. *James* rested on the statute's plain text, which does not extend to "all waters in a flood control project" but instead is limited to "flood waters" – *i.e.*, "'the water of a flood.'" Pet. Br. 12 (quoting Webster's Third Int'l Dictionary 873 (1981)).

Respondent's assertions at this late stage of the litigation regarding the nature and volume of waters released into the Madera Canal do little more than demonstrate that this issue is a question of fact that cannot be decided on the pleadings and furthermore face an insuperable obstacle: none of the materials on which Respondent relies are judicially noticeable, at least to the extent of defeating the contrary allegations of Petitioner's complaint. As noted above, the allegation of the complaint that Petitioner was damaged by "irrigation water" rather than "flood water" – *i.e.*, that the waters were not carried "for purposes of or related to flood control" as *James* requires – must be accepted as true. The determination whether that allegation is correct is inherently factual and ultimately can be made only after discovery and trial. Indeed, *Respondent* emphasizes the factbound nature of the question before the Court, explaining that "the central issue in this case [is] whether the leakage alleged to have been the result of accreted water damage over time was caused by the flood control purpose or the irrigation purpose of the Madera Canal" and that to resolve that question "it is necessary to understand * * * the purposes and operations of the CVP and its Friant Division, and the relationship of the Madera Canal to both irrigation and flood control." Resp. Br. 2, 49. Those are not issues that can be resolved as a matter of law.

In the first place, regarding a number of vital factual assertions, Respondent does not offer any factual support *at all*, much less support that is susceptible to judicial notice. A good example is Respondent's argument that, although it cannot establish the volume of

class 1 waters carried in the Madera Canal in past years, this case should be decided by "[a]ssuming the figure of 138,000 acre-feet of Class 1 water per year." Resp. Br. 40 n.23. "Assuming"? There cannot possibly be a basis for precluding Petitioner from exploring this critical, unsupported factual claim or the many others (including practically the whole of page 21) that fill Respondent's brief. See also, *e.g.*, Resp. Br. 10 (assertion regarding monitoring of Friant Dam for flood control), 11 (same regarding adjustment of water levels), 20 (same regarding coordination of water releases).

In the instances in which Respondent actually cites to documents, the referenced materials are not sufficient to strip Petitioner of the right to develop facts and prove its case. Justice Cardozo explained for a unanimous Court in *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, that the doctrine of judicial notice must not become "a pretext for dispensing with a trial":

> Courts take judicial notice of matters of common knowledge. * * * For illustration, a court takes judicial notice of the fact that Confederate money depreciated in value during the war between the states but not of the extent of the depreciation at a given time and place. The distinction is the more important in cases where as here the extent of the fluctuations is not collaterally involved *but is the very point in issue*. Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. "It does *not* mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable."

301 U.S. 292, 301-02 (1937) (emphases added) (citing, *inter alia*, 5 Wigmore, Evidence §§ 2571, 2580, 2583; Thayer, Preliminary Treatise on Evidence 277, 302; 1 Greenleaf, Evidence 18 (16th ed.)); see also *United States* v. *Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 698 (1899) (judicial notice is appropriate only if the matter can "be said to be a matter of general knowledge, or one that ought to be generally known[.] If not, it should be determined by evidence."). When, as in this case, the government's immunity is properly determined through factual development, it is improper to short-circuit that process by resort to "judicial notice." *Scheuer* v. *Rhodes*, 416 U.S. 232, 249-50 (1974); see also Fed. R. Evid. 201 ("[a] judicially noticed fact must be one not subject to reasonable dispute"); *id.*, adv. comm. note ("A high degree of indisputability is the essential pre-

requisite.").[3]

Respondent's claims simply do not satisfy the requirements for judicial notice. Petitioner alleges, consistent with the allegations of the complaint, that the waters leaking from the Madera Canal are used for irrigation, not flood control. That is the central matter in controversy in this case. Respondent admits that Petitioner is correct as to much of the water leaking from the Madera Canal, see *infra* (discussing "class 1" waters), and the parties hotly dispute the nature of the Canal's remaining volume. The sources relied on by Respondent may be contradicted or clarified in discovery and the contested issues must be resolved by trial.

b. Respondent Essentially Admits That It Is Not Entitled To Immunity For At Least Half The Waters At Issue In This Case: The "Class 1" Waters. Even if the materials cited by Respondent were judicially noticeable, the judgment below would still require reversal. First and foremost, Respondent admits, although again only in the footnotes, that a very large proportion of the waters carried in the Madera Canal – the so-called "class 1" waters – have absolutely *nothing* to do with flood control. Resp. Br. 39 n.20, 40 n.23. Respondent admits that these waters are diverted by the Bureau of Reclamation from the flow of the San Joaquin River into the Madera Canal at a time at which there is *no* risk of floods and under a contract that obligates the government to provide the water and, corre-

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[3] Respondent argues to the contrary based on this Court's statement in *Papasan* v. *Allain* that in reviewing a motion to dismiss "we are not precluded in our review of the complaint from taking notice of items in the public record." 478 U.S. 265, 268 n.1 (1986). But as *Papasan* explains in the very next sentence, which Respondent neglects to quote, relying on public record materials to establish facts is only appropriate when "[t]he historical facts recited here comprise in large part the factual allegations of the complaint *and are not disputed by the parties*." *Id.* (emphasis added). The other cases cited by Respondent are simply inapposite. *Bowen* v. *Johnston*, 306 U.S. 19, 23 (1939) (appropriate to take judicial notice of whether Georgia statutes grant the federal government exclusive jurisdiction over a park); *Lamar* v. *Micou*, 114 U.S. 218, 223 (1885) ("The law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof.").

spondingly, obligates recipients to utilize the water only for irrigation. *Id.* 36-37, 39 n.20, 40. According to Respondent, class 1 waters have encompassed just under half of the Madera Canal's volume for the past twenty years and *more* than half of its volume over the Canal's history. *Id.*; see also Resp. Supp. Br. in Opp. To Cert. 5 (acknowledging "the fact that the Madera Canal is used principally for irrigation"). Respondent does not even attempt to dispute that at least a proportional amount of these admittedly *non*-flood waters have leaked onto and damaged Petitioner's farm. Thus, at the very least, the judgment must be reversed because Respondent does not attempt to offer any theory on which these waters are "flood waters" as required to qualify for immunity under Section 702c.

c. **Respondent Is Not Entitled To Immunity For The Remaining Waters: The "Class 2" Waters.** Respondent contends that the remaining waters carried in the Canal – principally so-called "class 2" waters – are released for flood control purposes and therefore fall within the immunity provided by Section 702c. In support, Respondent cites a contract between the federal government and the Madera Irrigation District that supposedly deems "class 2 waters" to be those "'necessary to evacuate Project Water from Millerton Lake to prevent or minimize a spill or to meet flood control criteria.'" Resp. Br. 36 (quoting MID Contract, art. 3(h)(1)). Respondent is triply wrong, and its errors demonstrate the problems inherent in its attempt to put such factual matters in issue for the first time in this Court where they cannot be fully explored.

First, the provision quoted by Respondent is *not* the definition of "class 2" water, which is elsewhere expressly defined (in the "Definitions" section of the contract) as that water which "[b]ecause of its uncertainty as to availability and time of occurrence * * * will be undependable in character and will be furnished only if, as, and when it can be made available." MID Contract, at 7. Class 2 waters are thus defined by their juxtaposition to "class 1" waters, which are defined in the same section as those constituting "a dependable water supply." *Id.* In other words, because of the variable flow of the San Joaquin River, see Resp. Br. 39, the federal government has contracted to supply the volume of water that it knows will be available on a definite schedule (the class 1 waters) and has made contingent arrangements to supply additional water to the extent it becomes available (the class 2 waters). See 2 Central Valley Project Documents 83 (1957) (class 2 water is "that supply which may become

available over and above Class 1 water and which, because of its uncertainty as to time of occurrence, will be undependable in character and will be furnished only if, as, and when available as determined by the United States"). The contingency triggering the availability of class 2 waters accordingly is *not* a flood, but instead merely the existence of any water above the minimum anticipated annual flow that is necessary to fulfill "class 1" water obligations.

The provision of the contract quoted by Respondent specifically describes not "class 2 waters" but instead the conditions under which the government may declare an "Obligation Period" during part of the year; Respondent simply omits *both* the beginning and end of the relevant sentence, which is self explanatory. MID Contract, art. 3(h)(1) ("If, during the months of March through September, the Contracting Officer determines it will be necessary to evacuate Project Water from Millerton Lake to prevent or minimize a spill or to meet flood control criteria, he may establish one (1) or more Obligation Periods of such length as he shall determine to accomplish such evacuation."). The contract defines "Obligation Period" (again, in the "Definitions" section) not as the entire period in which class 2 waters are available, but instead as that time during which the government's contracting officer declares that a user *must* accept class 2 waters or suffer a penalty. *Id.* at 8 ("'Obligation Period' shall mean a period of time during which the Contractor shall be obligated to pay for up to a specified quantity of Class 2 Water in accordance with subdivision (h) of Article 3."). So far as the contract reveals and so far as Petitioner is aware, water users can and do receive class 2 waters outside of "Obligation Periods"; Respondent provides no support for a contrary conclusion. Thus, Respondent is wrong to assert that all class 2 water is by definition "flood water."

Second, even if "Obligation Periods" encompassed the entire period of delivery for class 2 waters, Respondent's argument would still be wrong because it assumes that such periods are triggered by floods. To the contrary, under the plain terms of the contract, the first triggering event for an Obligation Period is not a flood on the San Joaquin River but instead a desire "to prevent or minimize a spill." MID Contract art. 3(h)(1). "Spill" in this context has a vast meaning that Respondent fails to acknowledge: the release of *any* water from Friant Dam into the San Joaquin river bed for whatever reason. *E.g.*, 18 C.F.R. § 12.31 ("Gross storage capacity means the maximum possible volume of water impounded by a dam with zero

spill, that is, without the discharge of water over the dam or a spillway."). (It makes perfect sense that in the event of a possible "spill" the government initiates an "Obligation Period," which requires users to purchase class 2 waters, because a "spill" (unlike an irrigation release) brings in no revenue.) Of particular relevance here, "spills" are not necessarily related to floods but may be triggered simply by efforts to calibrate the volume of Millerton Lake in order to impound the maximum possible irrigation supply. See Pet. Br. 24-26 (explaining that water releases from Millerton Lake are calibrated in order to ensure that reservoir is full during period of peak irrigation demand).

Third, even if "class 2" waters were "flood waters" when held behind Friant Dam, a point Petitioner disputes, they would lose that character once distributed. The government could release the water into the river, but instead diverts it into the Madera Canal, which is a separate facility. The diversion is for the express and exclusive purpose of irrigation, as recipients pay for the water under a contract that forbids its use for any purpose other than irrigation. It is for this reason that, in every context other than this litigation, the government *uniformly* refers to the contents of the Madera Canal as "irrigation waters" rather than "flood waters," confirming Petitioner's commonsense view that Section 702c does not apply to the Canal's irrigation supply. Pet. Br. 30-31 (collecting numerous examples). Respondent's contrary view that "flood waters" retain that character even once diverted for irrigation is furthermore unworkable because it knows no limits – presumably, the government would remain immune even once the water has entered a municipal water supply or has been recycled in the environment, a result Congress could not have intended. See *id.* at 12-13.

d. Respondent Has Failed To Establish The Volume Of Any "Flood Control" Releases Into the Madera Canal. Respondent also claims that the government releases water into the Madera Canal exclusively for the purpose of avoiding floods on the San Joaquin River when more than 8,000 cubic feet per second must be released from Millerton Lake in order to avoid a flood on the San Joaquin. Resp. Br. 21-22, 37-40. Although the nature of these waters needs to be explored on remand, it is possible that they will fall within Section 702c. But Respondent's claim that such waters are released into the Canal as a matter of "routine practice," Resp. Br. 22, is the very grossest exaggeration and illustrates well Respondent's repeated efforts to have this Court blithely accept important factual assertions that would never survive critical inquiry at trial. Respondent cites only one document for its "routine practice" claim, and that document says nothing of the sort. An Army Corps of Engineers document states that "[d]uring flood management operations, floodwaters *can* be routed to the Fresno River via the Madera Canal" and that in periods of snow melt, "the Madera Canal *can* be used to convey up to 1,200 cfs into the Fresno-Chowchilla River System." U.S. Army Corps of Engineers, *Post-Flood Assessment for 1983, 1986, 1995, 1997, Central Valley, Cal.* 3-32 to 3-35 (1999) (emphasis added). But the document says absolutely nothing about when or how regularly this capability is utilized or indicates that any water actually is transferred in this fashion. The closest it comes to addressing the volumes of water possibly implicated is the statement, which Respondent omits, that only "*a relatively small portion* of the flood management releases from Friant Dam *can* be directed to the Fresno River via the Madera Canal." *Id.* (emphases added). By contrast, the same document confirms Petitioner's view that the vast majority of the water in the Canal is carried for irrigation, explaining (in another excerpt that Respondent omits) that water actually "*is* diverted to the Madera and Friant-Kern canals to provide irrigation and municipal and industrial water supplies to the eastern portion of the San Joaquin Valley." *Id.* (emphasis added). The fact that the Canal *can* carry flood flows does not, as if by alchemy, transmute waters carried *not* for flood control but instead for irrigation into "flood waters" subject to Section 702c.

There are still more reasons to doubt that such "flood control" releases are anything other than rare. Petitioner has not been able to identify a single document recording the volume of any such releases; apparently, neither has Respondent. Furthermore, Petitioner's opening brief collected a variety of sources documenting that the Madera Canal is used only for irrigation and that the water it conveys is charged to irrigation users. Pet. Br. 28, 32. Respondent also acknowledges that it operates the Dam for flood control only to the extent "compatible with its primary use for irrigation." Resp. Br. 27 (quoting Flood Control Doc. No. 2, at 3); see also *infra* at 18 (recounting sworn testimony of federal official in suit involving Friant Dam that Madera Canal is not part of Dam's designated flood control operations).

Perhaps most important is that the only source of hard data iden-

tified by Respondent appears to contradict its account. Federal water stations record the daily flows from Friant Dam into the San Joaquin River (station 11251000) and the Madera Canal (11249500). See <<http://water.wr.usgs.gov/index.html>>. As Petitioner understands Respondent's representations to this Court, the water stations should reflect that flows into the River "routine[ly]" approach or exceed 8,000 cfs and, in those instances, are diverted into the Madera Canal for transmission to the Chowchilla River. See Resp. Br. 22. But the water stations appear to show precisely the contrary. In a majority of the years in the 1979-1999 period selected by Respondent, flows from the Dam into the river bed never approached 8000 cfs (which Petitioner gauged by setting a threshold of 7600 cfs) *on a single day of the entire year*. And, so far as Petitioner could determine, on those days that flows into the river bed did approach 8000 cfs they showed *no correlation* with higher flows in the Madera Canal.

e. Releases Serving Multiple Purposes Should Be Evaluated Under the "Primary Purpose" Test. Even if Respondent were correct that the contents of the Madera Canal bore some relationship to flood control efforts, the government would be entitled to immunity only with respect to waters that serve the "primary purpose" of flood control.[4] Respondent argues to the contrary that *any* relationship to flood control is sufficient to trigger Section 702c. But Congress limited Section 702 to "floods or flood waters" rather than adopting a provision so expansive in breadth. On Respondent's view, Section 702c encompasses essentially every water release in any multiple purpose federal facility because, as Petitioner's opening

[4] Respondent's statement that Petitioner did not propose this test below, Resp. Br. 40, is correct but misleading: in the proceedings below, the parties were bound by the Ninth Circuit's longstanding precedent, which applied Section 702c immunity to all waters in a flood control project. It was only in this Court that an alternative test became relevant. Respondent's related argument that no court of appeals has looked to the principal purpose served by water releases, *id.* 44, is not correct – see *Henderson* v. *United States*, 965 F.2d 1488 (CA8 1992) (evaluating whether flood control was a substantial factor in water released based on the "primary purpose" of the release) – but to the extent that the circuits have not adopted that standard it is because they have not reached the question of what test to employ in such "mixed-use" circumstances.

brief explained, virtually every water release can be said to lower water levels and thereby incidentally reduce the risk of floods. Rather than contesting that point, Respondent embraces it, arguing that it is entitled to immunity because "the flood control benefit of a release for irrigation may rest in increasing storage capacity for an anticipated flood." Resp. Br. 35.

Respondent argues that *James* establishes that any relationship to flood control is sufficient to trigger Section 702c, emphasizing that *James* gave the phrases "any damage" of "any kind" in Section 702c their natural, broad reading in the course of rejecting the plaintiffs' claims in that case that the statute did not encompass governmental negligence. Resp. Br. 41. But this case has nothing to do with the word "any" in Section 702c. The relevant portion of the *James* opinion is instead its square holding that the phrase "flood waters" limits the scope of Section 702c to those waters "carried for purposes of or related to flood control." 478 U.S. at 605. Furthermore, the Court twice emphasized that the water releases at issue in *James* were for the purpose of flood control, strongly suggesting that a substantial relationship to flood control efforts is required. See 478 U.S. at 605 (releases were "to prevent flooding"); *id.* at 609-10.

It is also apparent that Congress intended that the immunity provided by Section 702c would be far narrower than Respondent asserts. The facilities constructed under the 1928 Act are projects with the virtually exclusive purpose of controlling floods. As *James* details, Congress enacted Section 702c in order to protect the government from an uncompensated liability – damage caused by flood waters carried in flood control projects – that is entirely absent in the context of revenue-generating activities such as the sale of irrigation water. The legislative history of the 1928 Act (on which *James* relied extensively) also unqualifiedly supports Petitioner's construction of Section 702c – a point detailed at length in Petitioner's opening brief and never addressed by Respondent. *E.g.*, Pet. Br. 13 n.3 (Congressional Record statements consistently treating "flood waters" as those retained, not released for irrigation); *id.* at 13-14 & n.4 (same for Corps of Engineers Report); *id.* at 15 (Congressional Record statements repeatedly distinguishing "flood control" from other beneficial uses of water). Among other things, the legislative history consistently draws a clear line between "flood control" activities and "irrigation" or "reclamation" efforts. *Id.* at 13-15. Particularly relevant here, an Army Corps of Engineers report expressly incorporated

by the 1928 Act is addressed specifically to waters used "primarily" for flood control as opposed to irrigation. *Id.* at 13. Finally, Section 702j of the Act distinguishes waters retained and then diverted for some other purpose (which it deems "reservoired waters") from "flood waters." 33 U.S.C. § 702j.

The primary purpose test also is supported by this Court's decisions interpreting the FTCA. As this Court has squarely held, Congress consciously considered and rejected provisions that would have immunized the government for all damaged caused by flood control projects, concluding that claims for non-flood damages should instead be resolved under the FTCA's discretionary function exemption. *United States* v. *Muniz*, 374 U.S. 150, 156 & n.9 (1963); *Dalehite* v. *United States*, 346 U.S. 15, 28 (1953). Congress specifically intended that the government would be liable for the negligent acts of its agents, both so that citizens would be compensated for damages they incurred and also to encourage the exercise of due care. Pet. Br. 16-17. For this reason, as *amicus* Pacific Legal Foundation details, this Court's decisions establish that exceptions to the FTCA, such as Section 702c's provision immunizing the government for damage caused by "flood waters," must be narrowly construed. PLF Br. 4-5.

In this respect, it is worth noting that Respondent never disputes that its position results in nothing more than an unjust wealth transfer between private parties, requiring Petitioner (who does not receive water from the Madera Canal) to subsidize the costs of project water that otherwise would be borne by irrigation users. Pet. Br. 17. If Petitioner prevails in this case, Respondent will simply pass on any resulting costs to the Madera Canal's irrigation users, a scenario wholly divorced from the risks of uncompensated liability that led Congress to enact Section 702c.[5]

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[5] Relatedly, it is worth noting that the MID Contract on which Respondent elsewhere relies requires irrigation users to indemnify the government for damage caused by waters from the Canal. MID Contract, art. 5(e). Respondent thus is clearly capable of securing any protection from liability it requires by contracting with irrigation users (who, unlike Respondent, benefit from the Canal). In addition, the terms of the indemnity provision are inconsistent with Respondent's claim in this Court that Section 702c applies to the Canal's contents. The government is indemnified for "damage of any nature whatsoever for which there is legal responsibility, including property damage, personal injury or death arising out of or connected with the control, carriage, handling, use, disposal, or distribution of such Project Water beyond [the Canal's delivery] points," all of which would be unnecessary if Section 702c applied, and furthermore indicates that the government is *not* protected from liability for negligent or willful conduct, which would be encompassed by Section 702c if it applied. *Id.*

Petitioner's position is thus not that "negligent operation of federal flood control projects is excluded from the FTCA's waiver of sovereign immunity" only if the statute's "discretionary function exception" applies. Resp. Br. 43. It is common ground that Section 702c excepts from the FTCA's waiver of sovereign immunity damage caused by waters carried in a flood control project for the purpose of flood control, including when the government has been negligent. *James*, 478 U.S. at 607-08. But Section 702c does not immunize the government for *all* damage resulting from flood control (or irrigation) projects, which would be the practical result of Respondent's view that "flood waters" include *all* of the waters in any multiple purpose project, no matter how tangential their relationship to flood control efforts.

Respondent also fails to grapple with the serious implications that its exceedingly expansive definition of "flood waters" would have for other provisions of federal law. Petitioner's opening brief collected several statutes that are triggered by the existence of "flood waters." Pet. Br. 22. Respondent says only that it is the responsibility of Congress, not this Court, to amend Section 702c. Resp. Br. 48 & n.31. But that is no answer at all. The definition of "flood waters" adopted in this case will have general applicability in federal law, and Respondent does not dispute that its anything-but-plain interpretation would produce ridiculous results for other federal programs. At the very least, these other statutes demonstrate Congress' consistent use of the phrase "flood waters" in a far narrower sense than proposed by Respondent here.

Respondent finally argues that waters impounded behind Friant Dam are an undifferentiated pool of water that cannot be segregated into "irrigation" and "flood" waters and that the primary purpose test would strip the federal government of immunity for waters stored in multiple purpose projects. Resp. Br. 47. But neither of those objections answers Respondent's argument that waters *once diverted* principally for a purpose other than flood control lose their character as

"flood waters." Pet. Br. 14-16. Any difficulties in differentiating the purposes served by waters while impounded behind a dam are minimized if not eliminated once the water is diverted into a separate facility such as an irrigation canal. The distinction between waters held behind a dam and those diverted for another purpose also makes perfect sense in the context of Section 702c: waters in some circumstances can be said to be regulated for flood control while held behind dams, but it is only reasonable to conclude that their character changes once diverted into irrigation canals principally for the purpose of irrigation. That is particularly true when, as here, the canals are separate facilities and the government charges irrigation users for the water. Congress simply could not have intended that the government's immunity would extend indefinitely into the future but, critically, Respondent fails to identify any point at which waters lose their character as flood waters under its reading of Section 702c.

In any event, even as to waters held behind a dam (which are not at issue in this case), Respondent fails to explain why it is not possible to determine whether the waters are retained for flood control or instead some other purpose. Of note, Respondent ignores the fact that it strenuously argued that the purpose for retaining water *could* be determined in another case in this Court. See Pet. Br. 26 n.8 (collecting twelve instances from Solicitor General's brief in No. 86-939, *ETSI Pipeline Project* v. *Missouri*). To the extent that the government initially impounds water in order to prevent a flood but continues to retain the water so that it will be available for irrigation (rather than releasing the water into the lower river bed over time), there is no reason that immunity should continue to attach.

II. The Madera Canal And Friant Dam Are Not "Flood Control Projects."

a. "Flood Control Projects" Are Distinct From "Reclamation" And "Irrigation Projects." This Court in *James*, after carefully evaluating Congress' intent in enacting the Flood Control Act of 1928, 478 U.S. at 606-08, concluded that the statute concerns only "flood control projects designed to control flood waters," *id.* at 605. Petitioner's opening brief established that Congress treats "flood control projects" as a distinct class of facilities operated by the Army Corps of Engineers essentially for the exclusive purpose of flood control. Pet. Br. 33-35. They are clearly distinct from "reclamation" and "irrigation" projects, which are operated by the Bureau of Reclamation, and which are financed by the sale of irrigation water to farmers with lands generally of 160 acres or less. *Id.*

Petitioner's opening brief established that Section 702c applies only to waters carried in "flood control projects," as Congress employs that term of art. The 1928 Act funded the construction of special-purpose flood control facilities. The Solicitor General explained in *James* that because "Congress was legislating with respect to flood control projects designed to carry flood waters," the government's immunity extends to "waters contained in or carried through such structures." Br. for United States, No. 85-434, at 17. As detailed in the previous section, Congress in adopting the 1928 Act manifestly did not have in mind irrigation and reclamation projects.

There is no question that the Madera Canal and the Friant Dam are reclamation, not flood control, projects.[6] That was the square holding of *Gerlach*. See Pet. Br. 35-39. After carefully reviewing the history of the Friant Dam specifically and the CVP generally, Justice Jackson's opinion explains that Congress provided that the reclamation laws would govern both Friant Dam and its attendant canals. 339 U.S. at 732-33. The Bureau of Reclamation specifically treated Friant as "a reclamation project," and "[e]ven a casual inspection of its committee hearings and reports leaves no doubt that Congress was familiar with and approved this interpretation." *Id.* at 739-40. Respondent's attempt to construe *Gerlach* as holding only

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[6] Independent of how one characterizes the Friant Dam, the Madera Canal is a separate "project" for purposes of Section 702c by several measures identified in Petitioner's opening brief and not contested by Respondent. Specifically, it is a separate "reclamation" or "irrigation" project. First, Congress recognized the Madera Canal (as well as its sister facility, the Friant-Kern Canal) as distinct facilities that are separate from the Friant Dam and, indeed, designated the canals as "irrigation facilities." See Act of June 22, 1936, ch. 689, 49 Stat. 1622, *quoted in* Resp. Br. 7. Second, the Bureau of Reclamation, which operates the Canal, recognizes and operates it as distinct from other facilities. See Pet. Br. 27-31. Third, Respondent funds the Canal separately, charging the costs of its construction and its operation to those who benefit from it: irrigation users. See *id.* These measures draw a clear, bright line between any immunity that applies to waters held behind Friant Dam and waters that are released into Madera Canal.

that flood control is not the "*sole* purpose" of the Friant Dam, Resp. Br. 31, thus is flatly inconsistent with the Court's opinion, and its arguments here simply mimic those that it made unsuccessfully in *Gerlach*. See Pet. Br. 36.[7]

b. The Madera Canal And Friant Dam Are Not "Flood Control Projects." Respondent argues that Congress *did* in fact designate the Madera Canal and Friant Dam as flood control facilities in two statutes. First, Respondent invokes Section 2 of the Rivers and Harbors Act of 1937, ch. 832, § 2, 50 Stat. 850, which authorizes "the entire Central Valley Project" for nine different purposes, including "controlling floods." Resp. Br. 19-20. But as Petitioner explained and Respondent inexplicably ignores, this Court rejected this precise argument when it was advanced by the Solicitor General in *Gerlach*. Pet. Br. 38. The proviso in question was enacted at a time in which it was doubted that Congress had power to construct reclamation projects for wholly intrastate waters. Addressing the precise words in the 1937 Act invoked again by Respondent in this case, the Court explained: "Congress' general direction of purpose we think was intended to help meet any objection to its constitutional power to undertake this big bundle of big projects" and thus "was in justification of federal action on the whole, not for effect on private rights at every location along each component project." *Gerlach*, 339 U.S. at 737-38.[8]

Gerlach aside, Respondent's argument makes no sense as a matter of statutory construction. According to Respondent, Section 2 of the 1937 Act deems every component of the CVP (including the

[7] Relatedly, although Respondent focuses the background section of its brief on the limited flood control functions of the Friant Dam, Resp. Br. 7-11, Respondent admits that the Dam's "primary use" has always been providing irrigation water, *id.* 27; see also *id.* at 23 (acknowledging that Petitioner's opening brief "correctly identifies the reclamation purposes of the Friant Division").

[8] *Gerlach* thus illustrates the fallacy of the Ninth Circuit's holding (endorsed by Respondent here) that Section 702c applies to every project that includes "flood control" as one of its stated purposes. Pet. App. 8a. For projects created before at least the 1940s, such a designation was intended at least in some instances only to preclude the project from being invalidated as beyond Congress' power.

Madera Canal) to have the purpose of flood control. But by parity of reasoning, every CVP facility must have each of the purposes listed in Section 2, including reclaiming "Indian reservations" and the "generation and sale of electric energy." That cannot be true. The Canal has never had anything to do with reclaiming Indian lands or generating electricity. Similarly, so far as Petitioner is aware, not even the Friant Dam irrigates Indian lands, and it certainly was not utilized for generating electricity until many decades after 1937. To the extent the 1937 Act is relevant at all, the controlling provision is therefore instead Congress' determination that "the said dam and reservoirs," *not* irrigation canals, "shall be used [for] flood control." 50 Stat. 850.[9]

Second, Respondent invokes Section 7 of the Flood Control Act of 1944, ch. 665, 58 Stat. 887. Resp. Br. 24-25. That statute directed the Army Corps of Engineers to issue "regulations for the use of storage allocated for flood control or navigation" on any kind of project constructed with any funds allocated for either purpose. 58 Stat. 890. The Corps, in turn, applied those regulations to Friant Dam, and Respondent argues that the Corps' determination is entitled to deference. Resp. Br. 27-28. But Section 7 of the Flood Control Act of 1944 directs the Corps to promulgate regulations regarding the flood control features (*i.e.*, flood storage space) of multipurpose projects. It is not addressed to the Corps' "flood control *projects*," to which the regulations do not apply, 33 C.F.R. § 208.11(a), and the Corps has never issued a regulation stating that the Friant Division is a "flood control project." To the contrary, the report that gave rise to the 1944 Act explains that Friant Dam will be used for flood control only to the extent "compatible with its primary use for irrigation." H.R. Comm. of Flood Control Doc. No. 2, 78th Cong., 2d Sess., *San Joaquin River and Tributaries* 3. Furthermore, the regulations expressly distinguish flood control activities from "other requirements" such as irrigation operations, 33 C.F.R. § 208.11(c)(5), and Respondent admits that the guidelines governing Friant Dam do *not* "specify use of the Madera and Friant-Kern Ca-

[9] Respondent's further argument that the CVP is a flood control project because courts in the Ninth Circuit previously so held, Resp. Br. 20, is mere bootstrapping. That line of Ninth Circuit precedent, which the panel below applied in this case, is wrong for the reasons set forth in the text.

nals," Resp. Br. 28; see also U.S. Dep't of Agric., Bureau of Agric. Econs., History of Legislation and Policy Formation of the Central Valley Project 235 (1946) (1944 Act expressly distinguishes between dams and reservoirs that serve flood control purposes and "irrigation works" that are "necessary for irrigation purposes").[10]

Finally, a federal official charged with managing water control facilities on the San Joaquin River for the Army Corps of Engineers has given sworn testimony in another case that squarely contradicts the Solicitor General's assertions in this Court, once again demonstrating the fallacy of Respondent's view that such factual matters can be resolved as an initial matter here. Thomas Patton testified that although the Madera and Friant-Kern Canals "*could* be used for flood flow diversion," "the canals are *not* part of the designated flood operation of Friant Dam [and in calculating flood flows] we did *not* release floodwater into the canals." Deposition of Thomas K. Patton, Oct. 26, 1998, Riverbend Ranch Golf Course v. County of Madera, No. CV-F-97-5550 (E.D. Cal.), at 95 (emphasis added).

Respondent's only remaining argument is that the Madera Canal and Friant Dam are flood control projects because they carry flood waters and because the CVP operates as an "integrated whole." Petitioner disputes both of those factual claims, but in any event *James* squarely held that Section 702c applies only to "flood control projects designed to carry floodwaters." 478 U.S. at 605. Respondent would collapse those two separate requirements. Moreover, Respondent's view would vastly expand the immunity available under Section 702c. As Petitioner explained in its opening brief, virtually every diversion of water from any federal facility (whether or not a "flood control project") reduces water levels and therefore arguably can be said to reduce the risks of floods. That is precisely the import of Respondent's argument that the CVP operates as "an integrated

[10] In fact, Respondent's resort to the deference owed to agencies only undermines its position because the Corps *has* issued a regulation that distinguishes between projects such as Friant Dam and flood control projects. As Petitioner explained and Respondent ignores, Congress authorized funding for the repair "of any flood control work threatened or destroyed by flood," which the Corps has by regulation construed to exclude "[s]tructures built primarily for * * * land reclamation." 33 U.S.C. § 701n(a)(1); 33 C.F.R. § 203.42(a).

whole," such that diversions in one part affect water levels hundreds of miles away, which in its view immunizes the government for any damage caused by any water-related activities in any of the CVP's hundreds of projects. Resp. Br. 21. Thus, Respondent does not dispute that under its position Section 702 would provide immunity for the components of the CVP that have nothing at all to do with "flood control" but instead transmit water for, *inter alia*, "'power development, domestic and industrial consumption, navigation, waste disposal, control of salinity, enhancement of fish and wild life, [and] beautifying the out-of-doors.'" Pet. Br. 20 (quoting Erwin Cooper, Aqueduct Empire: A Guide to Water in California, Its Turbulent History, and Its Management Today 153, 166 (1968)). Even more important, *Gerlach* squarely rejected the Solicitor General's argument that the supposedly "integrated" nature of the CVP rendered the Friant Dam a "flood control project," explaining that the CVP is "an aggregate of many subsidiary projects, each of which is of first magnitude." 339 U.S. at 733.[11]

III. Petitioner Does Not Claim Damages Arising From Flood Waters That A Flood Control Project "Cannot Control."

Respondent finally relies in passing *James* statement that "'flood[s]' and 'flood waters'" are "waters contained in or carried through a federal flood control project for purposes of or related to flood control, *as well as* * * * *waters that such projects cannot control*." 478 U.S. at 605 (emphasis added); Resp. Br. 18. Respondent argues that the emphasized clause confers immunity for all waters that escape a flood control project, including those waters for which it would *not* be immune if they were still contained in the project. It therefore contends that it makes no difference whether Petitioner was damaged by "flood waters," because Section 702c encompasses *all* waters of *any* kind that a flood control project "cannot control."

[11] Respondent claims in a footnote that the Court meant only that "Congress had specifically directed that the reclamation laws apply to the Friant Division." Resp. Br. 31 n.16. But that reading simply ignores the language of the opinion, including its explanation in the same paragraph that "[t]hese projects are not only widely separated geographically, many of them physically independent in operation, but they are authorized in separate acts from year to year and are to be constructed at different times over a considerable span of years." 339 U.S. at 733.

Respondent's reading of *James* and Section 702c is obviously flawed and it has never been adopted by any court. Contrary to Respondent's assertion, it specifically was not adopted by the Ninth Circuit in *Morici Corp.* v. *United States*, 681 F.2d 645 (CA9 1982). The emphasized clause self-evidently defines "floods" (not "flood waters") to be waters that flood control projects "cannot control," *i.e.*, waters that were so voluminous that they overran the project. In particular, there is no rational reading of the statute under which the federal government would *not* be immune for waters while retained in the flood control facilities that were the subject of the 1928 Act but *would* be immune if the government negligently released the identical waters resulting in deaths or property damage. Thus, Respondent is entitled to immunity only to the extent that the Madera Canal contains "flood waters," which *James* defines as those waters "contained in or carried through a federal flood control project for purposes of or related to flood control." 478 U.S. at 605. Furthermore, it is apparent that Respondent "can" control the water that is leaking from the Madera Canal, but simply refuses to do so.

CONCLUSION

For the foregoing reasons, as well as those stated in Petitioner's opening brief, the judgment should be reversed.

Respectfully submitted,

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